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No. 86-337

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

**BURLINGTON NORTHERN
RAILROAD COMPANY,
Petitioner,**

v.

**OKLAHOMA TAX COMMISSION, et al.
Respondents.**

**On Writ of Certiorari to the United
States Court of Appeals for the
Tenth Circuit**

**MOTION FOR LEAVE TO FILE AND POST-
ARGUMENT MEMORANDUM**

**ROBERT H. HENRY
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ATTORNEYS FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE POST-ARGUMENT
MEMORANDUM ON BEHALF OF RESPONDENTS

The Attorney General of Oklahoma,
Robert H. Henry, requests this Court to
grant him leave to file a post-argument
memorandum in the present case pursuant
to Sup.Ct.R. 35.6 for the following rea-
sons:

1. During oral argument in this case the Deputy Solicitor General stated that "only about ten of these [4-R] cases have involved overvaluation claims

of the kind involved here." Tr. of Oral Arg. 27. This statement is not accurate and grossly understates the correct total of such cases.

2. The Attorney General also requests this Court to allow him to point to the portions in the legislative history where the sales assessment ratio study is discussed, a point raised during oral argument.

3. Statements were made in Burlington Northern's Reply Brief which take certain legislative history out of context and the Attorney General requests the right to respond to those statements, which were made for the

first time in the Reply Brief.

Respectfully submitted,

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**POST-ARGUMENT MEMORANDUM OF RESPONDENTS
OKLAHOMA TAX COMMISSION AND OKLAHOMA
STATE BOARD OF EQUALIZATION**

During the oral argument in the present case on March 25, 1987, the Deputy Solicitor General advised this Court that "only about ten of these [4-R] cases have involved overvaluation claims of the kind involved here." Tr. of Oral Arg. 27. A review of the cases in only three states, Kansas, Cali-

fornia, and Oklahoma, shows that this statement is untrue.¹

With regard to California, the Attorney General's office in that state has advised this office that there are fifteen valuation cases pending. See Southern Pacific Transportation Co. v. State Board of Equalization, No. C 81 4848 DLJ (N.D. Cal.), (fourteen cases were consolidated under this case number by the court's order of November 10, 1983); and ACF Industries, Inc. v. State Board of Equalization, No. C 86 5483

¹ A survey of some other states shows that valuation cases have also been filed in other parts of the country. See Appendix "A" herein. This is not meant to be a complete list of all valuation cases pending in the United States. The fact that twenty-three states have joined this case as amici also shows the states believe that they will be overwhelmed by valuation lawsuits.

(N.D. Cal.). The South Pacific case includes the case of Atchison, Topeka and Santa Fe Railway v. Board of Equalization, 795 F.2d 1442 (9th Cir. 1986), where a petition for rehearing is pending.

In Kansas, from 1980 until 1984, every railroad in Kansas filed actions under Section 306 every year.² In both 1982 and 1983, the lawsuits of six of these railroads included valuation claims. Burlington Northern Railroad v. Lennen, No. 82-1561, reported on appeal at 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984); Burlington

² From 1980 until 1982 there were eleven railroads in Kansas. In 1983 another railroad, the Wichita Terminal Railway, was added, bringing the total to twelve. All of these railroads sued Kansas every year from 1980-84 under Section 306.

Northern Railroad v. Duncan, No. 83-4204 (D.Kan. 1983). - The valuation claims ended due to the Tenth Circuit's ruling in Burlington Northern Railroad v. Lennen, 715 F.2d 494 (10th Cir. 1983), cert. denied, 467 U.S. 1230 (1984).

In Oklahoma, two valuation cases were brought by Burlington Northern in 1983 (one for the 1982 tax year and one for the 1983 tax year; Burlington Northern was joined in the one for the 1983 year by three other railroads).

Burlington Northern Railroad v. Oklahoma Tax Commission, No. CIV-83-419-R (W.D. Okla. March 3, 1983) (1982 tax year); Burlington Northern Railroad Co., et al. v. Oklahoma Tax Commission, No. 83-2165-R (W.D. Okla. Sept. 6, 1983) (1983 tax year). In 1986 Burlington Northern and four other railroads filed

suit claiming that their property was overvalued. Burlington Northern Railroad, et al. v. Oklahoma Tax Commission, No. CIV-86-2726-W (W.D. Okla. Dec. 16, 1986).

These cases are in addition to valuation cases which have been noted previously in the briefs and the appendix filed in this case. Atchison, Topeka and Santa Fe Railway v. Board of Equalization, 795 F.2d 1142 (9th Cir. 1986); Burlington Northern Railroad v. Bair, 766 F.2d 1222 (8th Cir. 1985); Burlington Northern Railroad v. Department of Revenue, No. C-85-767-T (W.D. Wash. Oct. 25, 1985) (App. 71a); and Union Pacific Railroad v. Department of Revenue, No. 85-2102 LE (D. Or. May 6, 1986) (App. 77a).

The fact that this many cases have been brought alleging overvaluation claims when the law is unsettled makes it clear that if this Court were to hold that valuation claims could be addressed under Section 306, the floodgates of Section 306 litigation would open.

Furthermore, it cannot seriously be contended that valuation claims would gradually be resolved. Every year there are dramatic differences even in what each railroad says its own valuation is. For example, in its complaint filed in the present case, Burlington Northern contended that its full system value was \$1,495,253,000.00 in 1982. (App. 31a). In its complaint filed in the same court three years later, Burlington Northern alleged that its full system value was now "no greater than \$2,677,833,000."

Burlington Northern v. Oklahoma Tax Commission, No. CIV-86-2726-W (W.D. Okla. Dec. 16, 1986). Therefore, in less than four years Burlington Northern's self-valuation increased by over \$1,000,000,000.00.

It is therefore obvious that battles over valuation would continue into the future. As noted during the oral argument, in the present case the State and Burlington Northern have a disagreement of more than \$2,000,000,000.00 over the value of the railroad's property (the State's valuation of \$3,574,921,544.00 to Burlington Northern's claim that its full system value in 1982 was \$1,495,253,000.00).

The order of the district court in the Bair case after remand by the Eighth Circuit demonstrates the complexity

of valuation litigation, and the impossibility that valuation litigation would eventually be minimized.

Burlington Northern Railroad v. Bair,
No. 83-100-A (S.D. Iowa July 16, 1986)
(App. 43a-70a). See also the amicus brief of Fifty California Counties at 25-28.

The State contends that Congress never intended for federal courts to become mired in such an unprincipled fashion in the internal taxing procedures of the states.

Another issue raised during oral argument concerned the sales assessment ratio study, which Section 306(2)(e) endorses as the means to be used in determining the assessment ratio which railroad property is to be equalized with. The State respectfully directs

this Court's attention to S. Rep. No. 1483, 90th Cong., 2d Sess. (1968) 23-24, and S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969) 26-27,³ where the sales assessment ratio study is explained and endorsed.

A sales assessment ratio study is not a means of determining value. It is nothing more than a comparison of two numbers taken from the assessment roll -- the value of given property as of the lien date (the assessed value), and the value of such property as reported to the assessor when it is subsequently sold (the sales price, which is a reliable indicator of true market value).

³ This Senate Report is cited in this Court's opinion in Western Air Lines, Inc. v. Board of Equalization, 107 S.Ct. 1038, 1044 (1987).

Regarding one remaining point, in its Reply Brief Burlington Northern referred for the first time to statements made by Mr. Lanier (the representative of the Association of American Railroads), where he allegedly opposed a proposed amendment in a letter to Senator Hartke. However, a reading of the same letter reveals that Mr. Lanier made the following statement:

I would further remark that it is not realistic to suggest that passage of S. 2289 would subject the state assessing procedure to a judicial review to which it is not now subject. State courts can and do review valuations of property.

State Tax Discrimination Against Inter-state Carrier Property: Hearings for S. 2289 before the Subcommittee on

Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. 107 (1969).⁴

Furthermore, Mr. Lanier's earlier testimony during legislative hearings was important because it and similar assurances by Mr. Ogden and Professors Hartman and Sanders of Vanderbilt University were adopted in the two Senate reports referred to above. S. Rep. 1483 at 10-14, 22-24 and S. Rep.

⁴ Review of other remarks of Mr. Lanier mentioned for the first time in Burlington Northern's Reply Brief (at 11-12) reveals that Mr. Lanier was speaking only of equalization and tax rate relief, which was his constant theme throughout all hearings. Surface Transportation Legislation: Hearings on S. 2362, S. 1092, S. 1914, S. 2635, S. 2841, S. 2842, and S. Con. Res. 56 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 92 Cong., 1st Sess. 297-302 (1971-72).

91-630 at 12-13, 25-26.⁵ Cf. Kelly v. Robinson, 107 S.Ct. 353, 361, n. 13 (1986).

It is also significant that Senator Magnuson, who was one of the sponsors of the three predecessor bills to Section 306 (S. 2988, S. 927, and S. 2289), remarked:

I want to emphasize that S. 927 is intended to not interfere with the power of a state to assess and collect property taxes so long as common carriers are accorded equal tax treatment with other taxpayers.

Discriminatory Taxation of Common Carriers: Hearing on S. 927 Before the

⁵ Even the Eighth Circuit in the Bair case conceded that "[t]he [Iowa Director of Revenue's] argument is supported somewhat by legislature history indicating Section 306 was not intended to grant relief for overvaluation." 766 F.2d at 1225.

Subcommittee on Surface Transportation
of the Committee of Commerce, 90th
Cong., 1st Sess. 75 (1967).

The State again respectfully requests this Court to reject the interpretation of Section 306 urged by the Petitioner, which would cause massive federal court intrusion into their revenue gathering processes in a manner never contemplated by Congress.

Respectfully submitted,

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APPENDIX "A"

Other Valuation Cases
In Various Federal
Courts Around The Country
in Addition to those in
California, Kansas and Oklahoma

ARIZONA

Southern Pacific Transportation Co. v.
State of Arizona, Arizona Dept. of
Revenue, No. CIV-86-1757 PHX RCB (D.
Ariz.) (1986 tax year)

Atchison, Topeka, and Santa Fe Railway
v. State of Arizona, et al., No. CIV-86-
1794 PHX WPC (D. Ariz.) (1985 and 1986
tax years)

GEORGIA

Southern Railway, et al. v. State Board
of Equalization, et al., No. 81-695-A
(N.D. Ga.)

Norfolk Southern, et al. v. State Board
of Equalization, et al., No. 86-224-A
(N.D. Ga.)

IOWA

Burlington Northern Railroad v. Bair,
No. 83-100-A (S.D. Iowa) (tax years 1979
through 1982), reported on appeal at 766
F.2d 1222 (8th Cir. 1985)

Burlington Northern Railroad v. Bair,
No. 84-579-A (S.D. Iowa) (tax years
1984, 1985, and 1986)

MONTANA

Burlington Northern Railroad, et al. v.
Department of Revenue, CV-86-215-BLG-JFB
(D. Mont.) (two railroads filed
valuation cases for the tax year 1986)

OREGON

Union Pacific Railroad v. Dept. of
Revenue, No. 85-2102 LE (D. Or) (1985
tax year)

Burlington Northern Railroad v. Dept. of
Revenue, No. 85-2103 LE (D.Or.) (1985
tax year)

Union Pacific Railroad v. Dept. of
Revenue, et al., No. 86-4142 (9th Cir.)
(this is an appeal of the two previous
cases; both railroads appealed the
district court's ruling, which was based
on abstension)

Southern Pacific Transportation Co. v.
Dept. of Revenue, No. 86-70 LE (D. Or.)
(1985 tax year)

Union Pacific Railroad v. Dept. of
Revenue, No. 86-1063 (D. Or.) (1986 tax
year)

Burlington Northern Railroad v. Dept. of
Revenue, No. 86-1064 LE (D. Or.) (1986
tax year)

Union Pacific Railroad, et al. v. Dept.
of Revenue, No. 87-3554 (9th Cir.) (this
is an appeal of the previous two cases;

- 3a -

both railroads appealed the district court's ruling, which was based on abstention)

Southern Pacific v. Dept. of Revenue,
No. 86-1086 LE (D. Or.) (1986 tax year)

UTAH

Southern Pacific Transportation Co. v.
State of Utah, et al., Nos. C-84-0840-J
and C-84-0839-J (D. Utah) (tax years
1984-1985) (consolidated cases)

WASHINGTON

Burlington Northern Railroad v.
Washington Department of Revenue, No.
C-85-767-T (W.D. Wash.) (1985 and 1986
tax years)

Union Pacific Railroad v. Washington
Department of Revenue, No. C-86-889-T
(W.D. Wash.) (1986 tax year)

Trailer Train Co. v. Washington Depart-
ment of Revenue, No. C-86-78-TB (W.D.
Wash.)